

An Application for Reconsideration

- by -

Tregunter Holdings Ltd., Top Gun Lounge Ltd., Top Win Café Ltd., T.G. 223 Ventures Ltd., Granville Sushi Ltd., Richmond Japanese Sushi Ltd., Top Gun Restaurant Holdings Ltd. operating as Top Gun Chinese Seafood, 589934 B.C. Ltd. operating as Garden City Hotpot, T.B.W. Investments Ltd. operating as Top Gun Broadway Chinese Seafood and MB Techno Management Ltd. operating as Top Gun Surrey

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Norma Edelman

FILE No.: 2001/758

DATE OF DECISION: December 17, 2001



DECISION

OVERVIEW

This is an application by Tregunter Holdings Ltd., Top Gun Lounge Ltd., Top Win Café Ltd., T.G. 223 Ventures Ltd., Granville Sushi Ltd., Richmond Japanese Sushi Ltd., Top Gun Restaurant Holdings Ltd. operating as Top Gun Chinese Seafood, 589934 B.C. Ltd. operating as Garden City Hotpot, T.B.W. Investments Ltd. operating as Top Gun Broadway Chinese Seafood and MB Techno Management Ltd. operating as Top Gun Surrey (the "Ten Companies" and the "Appellant") under Section 116(2) of the *Employment Standards Act* (the "*Act*") for a reconsideration of a Decision BC EST #D539/01 (the "original decision") which was issued by the Tribunal on October 15, 2001.

The original decision was issued in response to an application by the Ten Companies for an extension of time pursuant to section 109(1)(b) of the *Act*, to file an appeal against a Determination issued by the Director of Employment Standards (the "Director"). The extension of time was not granted and therefore the Determination remained in effect. Now, the Ten Companies request that the Tribunal reconsider the adjudicator's decision to deny the extension of time.

ANALYSIS

In my opinion, the matters raised in this application for reconsideration are worthy of examination (see *Milan Holdings Ltd.*, BC EST #D313/98).

The Determination in question was issued on June 14, 2001 against 11 corporations associated with Top Gun Bowling Investments Ltd. pursuant to Section 95 of the *Act*. A timely appeal would have been filed on or before July 9, 2001 – in fact, the Ten Companies on August 27, 2001 filed the appeal.

In the original decision the adjudicator concluded that the Ten Companies failed to produce a compelling reason to extend the time limit for an appeal. Specifically, the adjudicator found there was no reasonable explanation for the delay in filing the appeal; there was no request to extend the time limits; the idea that the Appellant was waiting to see if the Determination issued against Top Gun Bowling Investments Ltd. could be settled was a weak excuse; and there was nothing in the Appellant's claims that led him to believe the Determination contained a serious error.

The Appellant seeks a reconsideration of the adjudicator's decision principally on the grounds that it did receive an extension and the Determination contained many errors. None of the employees involved in this matter have filed submissions opposing the application for reconsideration. The Director opposes the application but provides no particulars beyond his



view that the Appellant has not provided any different information from the arguments it made on the appeal and that its reasoning is "illogical and irrational". It may be the case that the Appellant has provided much the same information, but as I indicate below, I do not find the Appellant's reasons for the delay to be illogical or irrational.

On reviewing the original decision and the submissions of the Appellant I am satisfied that this is a case where the Tribunal ought to exercise its statutory discretion to extend the time for filing an appeal.

The material before me discloses the following:

- The Director issued a Determination against Top Gun Bowling Investments Ltd. on March 27, 2001 and a Determination against Top Win Café Ltd. on March 29, 2001. Both Determinations were appealed in a timely fashion on April 18 and 19 respectively. The employees involved in the Determination issued against Top Gun Bowling Investments Ltd. are the same ones involved in the Determination issued against the 11 corporations associated with Top Gun Bowling Investments Ltd.
- Following receipt of an appeal of the Determination against Top Gun Bowling Investments Ltd. on April 18, 2001, the Tribunal assigned a settlement officer to assist the parties in settling the appeal. The settlement officer was involved in the matter from June 4, 2001 to August 10, 2001.
- On July 3, 2001, Top Gun Bowling Investments Ltd. sent a letter to the settlement officer. The letter included the following statement: "We understand that you agreed to extend the deadline of the appeal of the Determination dated 14 June, 2001 from 9 July, 2001 to 30 July, 2001 due to the negotiation of the above settlement."
- On July 23, 2001, Top Gun Bowling Investments Ltd. sent another letter to the settlement officer. The letter referred to the previous July 3 letter and it included the following statement: "Since the complainants have no unanimous acceptance to the settlement proposal and Top Gun does need time to prepare the appeal document, we hereby request you can kindly extend the appeal deadline of the said Determination to 30 days after your confirmation of the cancellation of the settlement proposal."
- On August 9, 2001, the settlement officer wrote Top Gun Bowling Investments Ltd. that there was no settlement.
- At no time did the Tribunal advise Top Gun Bowling Investments Ltd. that it had accepted, or not, an extension of the time limit to file an appeal.
- On July 31, 2001, the Director issued a Determination against 11 corporations associated with Top Win Café Ltd. pursuant to Section 95 of the *Act*. This Determination was appealed in a timely fashion on August 27, 2001.



- On August 27, 2001, the Ten Companies filed an appeal of the June 14, 2001 Determination.

The adjudicator found that the Appellant may well have been led to believe it had until July 30, 2001 to appeal the June 14, 2001 Determination given the Tribunal did not issue anything to the contrary. I agree with him on this point. The adjudicator, however, did not accept that the July 23, 2001 letter was a request for an extension of the time limit to appeal the June 14, 2001 Determination. On this point, I respectfully disagree. The July 23 letter makes reference to the July 3 letter, which clearly concerns the June 14 Determination. Moreover, since the Determination against Top Gun Bowling Investments Ltd. had already been appealed in a timely fashion and there was no other outstanding Determination at the time, the only Determination that could have been referred to in the July 23 letter was the June 14 Determination. Accordingly, I accept that not only did the Appellant believe it had until July 30 to appeal the Determination, it also believed it had a further extension given the Tribunal said nothing to the contrary.

There were several opportunities for the Tribunal to advise the Appellant that it accepted or rejected the request for an extension. It failed to do so, and I do not believe the Appellant should be penalized, in those circumstances, for believing that no reply from the Tribunal meant it agreed to an extension. I agree with the adjudicator that the Appellant's explanation that it did not file an appeal before August 27 because it was waiting to see if the Determination issued against Top Gun Bowling Investments Ltd. could be settled is a weak excuse, if it is taken in isolation. However, given the Appellant believed it had an extension, which was related to the outcome of settlement discussions concerning the Determination against Top Gun Bowling Investments Ltd. the explanation is not unreasonable, particularly since the same employees were involved in both Determinations.

Given the foregoing, I find there was a reasonable and credible explanation for the timing of the appeal and there was an ongoing and bonafide intention by the Appellant to file an appeal of the June 14 Determination in a timely way and this intent was made known to the Tribunal, via its settlement officer, in advance of the expiration period. Furthermore, there is nothing before me (just as there was nothing before the adjudicator) to show the Respondents will be unduly prejudiced by granting an extension. Finally, although I do not disagree with the adjudicator regarding the substantive issues, on the other hand, I am not satisfied that the appeal on its face is obviously frivolous, particularly as it relates to the Section 95 declaration. For these reasons I am of the view an extension of time should be granted in this case and as a result the original decision is cancelled.



ORDER

Pursuant to Section 116, I cancel the original decision. Further, pursuant to Section 109(1)(b) of the *Act* I order that the time for filing an appeal with respect to the Determination issued on June 14, 2001 be extended to August 27, 2001. Accordingly, the appeal was filed within the extended time period and thus will now be adjudicated on its merits. In due course, the parties will be invited under separate cover to make submissions on the merits of the appeal.

Norma Edelman
Vice-Chair
Employment Standards Tribunal